LIBRARY
COURT. U. S.

Office Supreme Court, U.S.
FILED
SEP 18 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 156

FRANCIS D. HOUSTON,
Petitioner

v.

THE UNITED STATES,
Respondent

Petition for a Writ of Certiorari to the United States Court of Claims

---

PETITIONER'S REPLY TO THE BRIEF OF RESPONDENT

CLAUDE L. DAWSON,
1049 Shoreham Bldg.,
Washington 5, D. C.
Attorney for the Petitioner.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
Petitioner's Reply to the Brief of Respondent	1-7
Conclusion	8

CITATIONS

Alabama Great Southern Railway Co. v. Louisville & Nashville RR., 224 F.2d 1, 50 A.L.R. 2d 1302	2
41 American Juris pleadings, Par. 312, pg. 525	2
Dewey v. Clark, 86 App. D.C. 137, 180 F.2d 766	2
Freedman v. Thomas J. Fisher & Co., Municipal Court of Appeals, D.C., 88 Atl. 2d 321, 31 A.L.R. 2d 827	2
Houston v. Mason, et al., 267 F.2d 654, 655	7
Kahn v. Brady Transfer & Storage Co., 159 F.2d 383, 170 A.L.R. 999. Cert. Denied 331 U.S. 841, 91 L.Ed. 1854, 67 S.Ct. 1535	2
Love v. United States, 122 Ct. Cls. 144, 151	2-6
Palmer v. Chamberlin, 191 F.2d 532, 859, 27 A.L.R. 2d 416	2
Parmelee v. Chicago Eye Shield Co., 157 F.2d 582, 108 A.L.R. 1130	2

In The

Supreme Court of the United States

October Term, 1962

No. 156

Francis D. Houston,

Petitioner

v.

The United States,

Respondent

Petition for a Writ of Certiorari to the United States Court of Claims

---

PETITIONER'S REPLY TO THE BRIEF OF THE RESPONDENT

It is deemed necessary to file a Reply Brief to the brief presented by the Respondent in this case. Consideration of the brief by the Respondent indicates clearly that no extensive study was made to ascertain the true and correct facts in this case. The petitioner made charges against certain officials of the Federal Housing Administration

and all of such charges were sustained by the overwhelming weight of the evidence before the United States Civil Service Commission. In fact, all of the employees mentioned by the petitioner in his charges were subsequently dismissed from governmental service. The petition filed in this case in the United States Court of Claims alleges arbitrary and capricious action by the officials of the United States Civil Service Commission. The Respondent in the court below made a motion for a summary judgment. This motion for summary judgment admits all of the facts contained in the petition of the court below. There was distinctly an issue of fact to be determined under the proceedings filed, and where such an issue of fact exists a motion for summary judgmnt cannot be sustained.

The rule that the courts cannot grant a motion for summary judgment where there is an issue of fact involved is so well known as to not require any citations of authorities. The following cases are called to the attention of the court.

Parmelee v. Chicago Eye Shield Co., 157 F.2d 582, 108 A.L.R. 1130

Kahn v. Brady Transfer & Storage Co., 159 F.2d 383, 170 A.L.R. 999. Cert. denied 331 U.S. 844, 91 L.Ed. 1854, 67 S.Ct. 1535

Dewey v. Clark, 86 App, D.C. 137, 180 F.2d 766

Freedman v. Thomas J. Fisher & Co., Municipal Court of Appeals, D. C., 88 Atl. 2d 321, 31 A.L.R. 2d 827

Palmer v. Chamberlin, 191 F.2d 532, 859, 27 A.L.R. 2d 416

Alabama Great Southern Railway Co. v. Louisville & Nashville RR., 224 F.2d 1, 50 A.L.R. 2d 1302

Love v. United States, 122 Ct. Cls. 144, 151.

The authorities in this regard are also collected in *41 American Juris pleadings, Par. 342, pg. 525.* This ques-

tion alone should place this case on the "summary" calendar granting the writ for certiorari and directing the United States Court of Claims to take the proof on the issue of fact involved in this action.

There is not only an issue of fact, but the facts are disputed, and justifies the petitioner in making the following comment.

In Respondent's brief an unfair and distorted picture is drawn. In order to bring the case back into proper focus Petitioner is compelled to offer some pertinent observations.

To start with, Petitioner did not make allegations against his superiors in November 1953, as stated on page 3 of Respondent's brief. Also an inspector was not sent to investigate any such allegations, as inferred by Respondent. The truth is that the inspector, so called, J. A. Woods, was ordered to proceed to Honolulu for the purpose of inquiring into *underwriting matters only.* Woods was not an inspector or a trained investigator. He was Supervising Underwriter for the Hawaii area. He had supervisory responsibility over all Federal Housing Administration business in Hawaii for many years. His superior, Mr. Mack, used the utmost care, *even put his words within quotations marks,* to be sure that Woods understood that his investigative authority was definitely restricted to *underwriting matters only.* (See Letter Mack to Woods 11/17/'53)*

Woods did not send his *report (Ex. #8) to the Director* of Personnel. He directed it to Curt C. Mack, Assistant Commissioner for Underwriting. The sum total of the Woods inquiry is found in the four charges alleged to have been made, orally, by Petitioner, as shown on page 4 of the petition. These are the only charges mentioned

* "Cassidy induced Mack to send Woods to Honolulu." (See pg. 8 of petition)

in the report and *none of them relate to underwriting.* This is not denied. Therefore Woods clearly exceeded his authority. Moreover, Woods, in addition to having a deep personal interest in the controversy made only a *pretended* investigation. (See Comments on Investigator Woods' Report on page 12 of the petition).

Reference is made to the footnote on page 4 of Respondent's brief. Here Respondent seeks to make it appear that the four accusations "initially made to the investigator" were the only charges concerned. Respondent finds it inconvenient to refer to the eight additional charges contained in the letter of December 29, 1953 (Ex. #6) which are shown on pages 2 and 3 of the petition. Woods had no knowledge of these latter charges and made no mention of them in his report. (See pg. 25-(2) of the petition). Therefore the Woods report does not *indicate* that those charges were *contrary to the facts,* as claimed by the agency. (Ex. #28, pg. 1) Also Respondent was careful to invite no attention to Petitioner's follow-up letter (Ex. #7) in which Petitioner requested that the charges be investigated. These charges have never been investigated by anyone.

Respondent says (page 4): "The Civil Service Commission conducted a field investigation". To call it an "investigation" is a gross exaggeration. The investigator spent eight days on the case. (See page 10, par. 3 of the petition). He took 82 pages of sworn testimony from Petitioner and affidavits from about a dozen witnesses. The testimony of all witnesses except that of John Wright was favorable to Petitioner. The Civil Service Director ruled that John Wright's testimony was false. (Ex. #48, pg. 23).

It is not likely that the Court will consider such investigation, *which does not include statements from the key figures, J. Stowell Wright, Whisenand and Cassidy,* worthy of the name. (See pg. 32-par. 1 and 2 of the Peti-

tion). They all had ten months in which to offer sworn statements, but chose not to risk it. Whether they refused to testify or not the Civil Service Commission does not say.

On page 4 of the brief Respondent says: "Petitioner submitted a written reply, dated July 22, 1954, in which he restated his prior allegations, i.e., maladministration on the part of the two cited officials." An examination of the letter referred to (Ex. #31) shows that Respondent's statement, quoted above, is not true.

Respondent refers (page 4) to Petitioner's waiver of his right to a hearing. The court's attention is invited to (page 27, pars. 2 and 3) of the petition for an explanation of the manner in which petitioner was deprived of his right to a hearing, by trick. Respondent refers (page 5) to a memorandum submitted by Petitioner. (Ex. #51) This memorandum (12 pages) contained many solid representations which were summarily rejected and the Board of Appeals and Review gave no reason or a word of explanation. A flagrant abuse of discretion.

The Court did not make an "extensive review of the facts", as Respondent stated (page 6) On the contrary, as stated in the petition (page 5, par. 2), the court did not consider the merits of Petitioner's case. The Court below did not understand the facts. It mistakenly believed that Woods had investigated the charges made in the letter of December 29, 1953 (Ex. #6), unaware that Woods himself had made no such claim and had not mentioned those charges in his report. Due to this misunderstanding of the facts the court bases its opinion upon the *hopelessly incredible* notion that Woods had investigated charges of which he had no knowledge, and even before the charges had been made. (See Supplemental Statement of the Plaintiff to motion for rehearing; and page 54 of the petition).

It is noted that Respondent says nothing in opposition to Petitioner's contention re error of the Court in sustaining a motion for summary judgment when there were genuine issues of material fact unresolved. (Harold Robert Love v. The United States, 122 Ct. Cls. 144, 151); (and page 36 of the petition). Certainly the cause of justice would not have been badly served if the Commissioner had heard testimony from readily available witnesses. Investigator Woods, Director Foley and Personnel Director Lomax are still in government service, Former Asst. Commissioner Mack lives in the District of Columbia and former Commissioner Hollyday resides in nearby Baltimore.

Not a word in the "Statement of Facts" shown in the petition has been challenged. Nevertheless Respondent would delude the court by indirection, using an untrue statement of facts of Respondent's own making. Respondent would have the court believe that: 1) Petitioner made accusations in November 1953; 2) that Woods was ordered to investigate those accusations; 3) that Woods, a disinterested and impartial inspector, made an honest and objective investigation; and 4) that the investigation indicated that all accusations made by Petitioner, including eight, of which Woods had no knowledge, were contrary to fact. The contents of three letters of record: (1. Francis D. Houston to M. Joseph Cassidy 11/12/'53; 2. Curt C. Mack to J. A. Woods 11/17/'53; and 3. M. Joseph Cassidy to J. Stowell Wright 11/27/'53) when considered together with misstatements of fact in Respondent's brief previously referred to clearly expose a transparent ruse which is an affront to the Court.

That Petitioner is not one given to making reckless charges is indicated by the fact that all three of those accused by him were separated from the service. First, McCurry confessed his guilt, as charged by Petitioner, and resigned. Next, Wright resigned, by request, even

before Petitioner had been separated. The charges were still hovering over him. He has never denied them. And finally, Whisenand was held by the Civil Service Director to be guilty of defrauding the government, as charged by Petitioner. Later, Whisenand was discharged, and the evidence furnished by Petitioner was used as the basis for the removal action. (Ex. #70) Yet, ironically, Petitioner was dismissed for making charges which were *contrary to the facts*. From these developments a disinterested observer would be justified in concluding that Petitioner, a faithful public servant, was the victim of what has been aptly termed an "Administrative Lynching".

The argument of the Respondent is set forth on pages 6 and 7 of its brief. Not a single case is cited which relates to any of the issues involved in this case. The question involved in this case is not a question of procedural errors which had already been determined by the United States Court of Appeals for the District of Columbia in *Houston* v. *Mason, et al.*, 267 F.2d 654, 655, but the issue is whether or not the action of the United States Civil Service Commission which was not adjudicated by the United States Court of Appeals for the District of Columbia was arbitrary and capricious, and that question involves an issue of fact. The United States Court of Claims in sustaining the motion for summary judgment clearly erred because this issue of fact was present.

CONCLUSION

For the reasons herein stated, the petition for certiorari in this case should be granted.

Respectfully submitted,

CLAUDE L. DAWSON,
1049 Shoreham Bldg.,
Washington 5, D. C.
Attorney for the Petitioner.